



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 1, 1996

Mr. John Steiner
Division Chief
City of Austin
P.O. Box 1088
Austin, Texas 78767-1088

OR96-0466

Dear Mr. Steiner:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 39142.

The City of Austin (the "city") received a request for:

1. any and all documentation pertaining to work done by Defendant Michael S. Heyl Construction, Inc. construction contracts bearing CIP Nos. 388-227-0939, 439-237-0926, and 443-237-0704; and
2. any and all documentation pertaining to construction and/or repair work performed at 12444 Research Blvd., Austin, Texas by Defendant Michael S. Heyl Construction, Inc., either in the course of the above-referenced contracts, or otherwise.

You state that the bulk of the requested information will be made available to the requestor. However, you claim that three pages of information are excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claimed and have reviewed the documents at issue.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.-Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990)

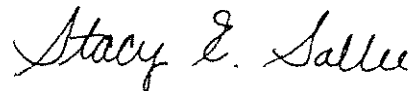
at 4. The city must meet both prongs of this test for information to be excepted under section 552.103(a).

Litigation cannot be regarded as "reasonably anticipated" unless there is more than a "mere chance" of it -- unless, in other words, we have concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision Nos. 452 (1986), 331 (1982), 328 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision Nos. 452 (1986), 350 (1982). This office has concluded that litigation is reasonably anticipated when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, and when a requestor hires an attorney who threatens to sue a governmental entity. Open Records Decision Nos. 555 (1990), 551 (1990). Here, you claim that litigation is reasonably anticipated because a party to litigation a year ago indicated that it was considering joining the city in that pending lawsuit. We conclude that this fact alone does not establish reasonable anticipation of litigation. Therefore, the city may not withhold the requested information under section 552.103(a) of the Government Code.

Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5. We have reviewed the submitted information and conclude that some of it is privileged information and may therefore be withheld under section 552.107(1) of the Government Code. We have marked the information that may be withheld. The remainder of the information may not be withheld.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/ch

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Enclosures: Marked documents

cc: Mr. John T. Beliveau
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(w/o enclosures)